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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF COUNTY OF INYO, BISHOP CREEK WATER ASSOCIATION, FRIENDS OF BISHOP CREEK, and WALLACE E. CRITTENDEN

As Amici Curiae
In Support of the Petitioner

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No. 89-333

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STATE OF CALIFORNIA,
Petitioner,

VS.

FEDERAL ENERGY REGULATORY COMMISSION, et al.
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BRIEF OF COUNTY OF INYO, BISHOP CREEK WATER ASSOCIATION, FRIENDS OF BISHOP CREEK, and WALLACE R. CRITTENDEN

As Amici Curiae in Support of the Petitioner

INTERESTS OF THE AMICI CURIAE

Amici curiae County of Inyo, Bishop Creek Water Association, Friends of Bishop Creek, and Wallace R. Crittenden share an interest in maintaining the flow of Bishop Creek, rising in the eastern ridge of the Sierra Nevada and coursing through the community of Bishop to its confluence with the Owens River. The County of Inyo is the political subdivision of the State of California through which the entire course of Bishop Creek runs. The Bishop Creek Water Association, composed of the owners of water rights in lower Bishop Creek, has administered those rights by mutual association and self-government for more than half a century. The Friends of Bishop Creek and Wallace R. Crittenden are residents in the West Bishop community who individually hold and enjoy the rights to the existing flow of lower Bishop Creek.

The amici's interest in the flow of Bishop Creek is prejudiced by the application of Rancho Riata Hydro Partners, Inc. (engineered by the same Joseph R. Keating who initiated the Rock Creek Partnership proceedings in the case before the Court) for construction of a small hydroelectric project along Bishop Creek and upstream from the uses of the resident amici. The Rancho Riata Partners' application is presently pending before the Federal Energy Regulatory Commission (FERC), awaiting determination of the petition for rehearing filed by the amici.

At issue in the present FERC application of Rancho Riata Partners is the amenability of Rancho Riata Partners' application to conditions that may be imposed on the hydroelectric project by the State of California; or stated conversely, the degree to which a FERC

license, if issued, would interfere with the administration of California water rights in Bishop Creek.

The amici therefore share the interest of their State government, ably represented in this proceeding by the Attorney General, to govern the *conditions* under which water rights are exercised in the operation of a FERC-licensed hydroelectric project. The amici do not wish or need to reargue the doctrines of federal preemption and Congressional intent cogently presented by their Attorney General and the amici sister states through the Attorney General of Idaho. Rather, by virtue of their practical experience as frustrated participants in FERC's regulatory proceedings, amici wish to offer the Court a pragmatic perspective on the harm that would flow nationwide were the Ninth Circuit's decision, reposing in FERC the preemptive authority to establish streamflow conditions, to become the law of the land.

SUMMARY OF THE ARGUMENT

Amici draw on their own experience to assert that as a practical matter, FERC cannot fairly and efficiently assume the nationwide responsibility for stream administration that the Ninth Circuit's decision presumes. FERC's self-imposed limitations on generous public participation, its distance from and ignorance of the hydrologic realities of the humble streams that give life to the high desert, and its workload will continue to frustrate a fair and timely resolution of water disputes in all regions of the country. Congress therefore wisely chose to repose the conditioning of water rights exercise in the States.

Amici also draw on their historical research to demonstrate (again, as a practical matter) that the

subsequent history of *First Iowa Hydro-Electric Cooperative v. Federal Power Comm.*, 328 U.S. 152 (1946) shows that the Federal Power Commission (FPC) had wisely asked the Court in that case to honor the States' interest in water rights administration. *First Iowa* has produced no dam, no hydropower, but decades of headaches for the commission and the State of Iowa. Therefore this Court should welcome the opportunity to correct the Ninth Circuit's misplaced reliance on the *First Iowa* decision.

ARGUMENT

I. THE FEDERAL ENERGY REGULATORY COMMISSION CANNOT FAIRLY AND EFFICIENTLY ASSUME A NATIONWIDE RESPONSIBILITY FOR STREAMFLOW ADMINISTRATION.

The grandiloquent titles of the Federal Power Act and the Federal Power Commission (now succeeded by the Federal Energy Regulatory Commission) evoke images of national administration over great dams on mighty rivers such as the Columbia and the Colorado. In reality, however, the Court's decision in the present case will not affect our grandest interstate resources and thoroughfares of commerce, but rather the hundreds of humble streams confined, like Rock Creek in the instant case or Bishop Creek in the case of the amici, to the borders of one county, with lengths measured in tens of miles and flow in tens of cubic feet per second. The experience of the amici shows that when Congress in section 27 of the Federal Power Act reposed plenary power in the States to govern the flow of these tributaries, it honored the practical limitation of a distant federal bureaucracy to administer streams such as Rock

and Bishop Creeks.

Consider the case of Bishop Creek. At issue in the Rancho Riata Partners' application is 30, perhaps 60, cubic feet per second of flow; modest to those accustomed to the Potomac, but life- and environment-sustaining to the high desert dwellers of the Owens Valley. In initially granting the application of Rancho Riata Partners' predecessor, FERC concluded that the project would not harm the amici because the project flow would be returned to Bishop Creek upstream of the resident amici's uses. *Symons*, 42 FERC ¶ 61031 (1988). This conclusion, originating with an assertion in FERC's environmental impact statement, Final EIS, Owens River Basin, Seven Hydroelectric Projects, California, at 4-43 (1986), is simply wrong, as combining the maps on two separate pages of the EIS reveals, *id.* at 2-14, 2-15. (The combined maps, page 7-A of the amici's brief before FERC in support of petition for rehearing, appear as appendix A to this brief.) Rancho Riata Partners' project would take water and remove it permanently from Bishop Creek, returning it to the Owens River by a separate ditch system that bypasses the resident amici's uses.

Before FERC issued its licensing decision, resident Crittenden and the Bishop Paiute Indian Tribal Council had formally intervened in the FERC proceedings. Following the decision, Crittenden and the Indian Tribe sought rehearing; because the Indian Tribe's petition arrived in Washington one day late (having been mailed from Bishop within 30 days of the FERC decision), FERC summarily rejected it. After FERC's decision, the California Department of Fish and Game, City of Bishop, and Bishop Creek Water Association sought leave to intervene and protest; these interventions were

denied as untimely. By the fortune of individual Crittenden's timely intervention and petition for rehearing, one man's protest survives; it remains within FERC's discretion whether to hear on the merits the protests of the California Department of Fish and Game, County of Inyo, City of Bishop, Bishop Paiute Indian Tribal Council, and Bishop Creek Water Association.

The amici presented their briefing in support of their protests nearly two years ago. Approximately one year ago amici received unconfirmed reports from their supporting Congressman and FERC staff that FERC might soon decide the petitions for rehearing and intervention. Accordingly, counsel for the protestants (and amici) wrote to FERC to obtain in advance of the commission's meeting: notice of the meeting in time to arrange travel from California, a copy of the staff recommendation in time to comment on it, and opportunity to address the commission in support of or opposition to the staff recommendation. (Amici's counsel's letter to FERC appears as appendix B to this brief.)

One month later FERC's general counsel responded to amici's counsel, explaining that the FERC meetings are not those "in which the Commission invites the public to participate," that "the public and parties to proceedings before the Commission for a decision have no 'right' to participate in the Commission's deliberations," and that "[t]he public is not entitled to comment on or debate the advisory staff's recommendations to the Commission." (The general counsel's response to amici's counsel appears as appendix C to this brief.)

Three months ago Rancho Riata Partners complained

to FERC that its delay in decision was prejudicing the *applicants'* interest in the project: "FERC by its lack of action in these types of matters is basically making an indirect decision lending support to a no project conclusion." Rancho Riata Partners' motion for expedited action on pending appeals (Oct. 23, 1989).

To date FERC has made no decision on the pending rehearing application of Crittenden and intervention and rehearing applications of the other amici.

This record belies FERC's ability to administer streamflows as the Ninth Circuit's decision anticipates:

1. FERC eliminates public participation by rigid and harsh enforcement of procedural rules pertaining to intervention and rehearing petitions. (In contrast, for example, the U.S. Forest Service broadly solicits public commentary, and generally places substance before form in allowing valuable comments to be considered.)

2. FERC fails to accord proper deference to the *public authorities* charged by the law of California with the protection of their citizens' environmental and natural resources. FERC similarly fails to recognize the great interest of the local Indian tribe.

3. FERC premised a decision vital to the affected local citizenry on a plainly erroneous reading of its own record.

4. FERC apparently cannot timely correct its error once presented with evidence of the error.

5. FERC does not invite public review of staff proposals in time to allow public comment prior to commission decision.

6. FERC does not invite public participation in its own proceedings.

7. FERC's inability to complete its workload prejudices project applicants, interested local government, and citizens protestants alike.

Amici's assessment of FERC has been reflected in findings of the Congress itself, expressing frustration at FERC's unwillingness to accord proper recognition to citizen-objectors, and FERC's reluctance to honor intervenors' claims that environmentally harmful projects should not be licensed. House Conf. Rep. No. 99-934, 99th Cong. 2nd Sess. 21 (1986) ("The provisions are adopted with a view of not merely codifying existing practice at . . . FERC . . . but to change and improve it."); House Rep. No. 99-507, 99th Cong. 2d Sess. 17 (1986) ("In short, FERC's treatment under the Federal Power Act and applicable environmental laws . . . has been less than satisfactory."). Unfortunately not even these findings have benefited the amici, as reflected in FERC's subsequent transactions with them.

In contrast to their experience before FERC, the amici over the years have come to expect from the California Water Resources Control Board a welcoming of and responsiveness to "public participation" from local government and citizens. California may be the nation's largest state in terms of both population and wealth of natural resources (and as frequently observed, in its own right one of the world's leading economies), but in matters of water, where small quantities make great differences in the quality of life, the state water board and its staff do not act in geographic or institutional isolation from its constituencies. The record in the present case exemplifies this state board's knowledgeable

adjudication of a small stream dispute. When a proceeding is instituted, staff members visit the affected locale frequently, establishing on-going personal contact with affected parties. When a staff recommendation is completed, public release follows so that both its technical accuracy and political feasibility can be tested in the public arena before the board takes final action. *A fortiori*, the rules of public participation are administered flexibly and toward the end of promoting well-informed and broadly-accepted decisions. *See, e.g.*,23 Cal. Code Regs § 761(a) ("In addition to applicants, petitioner and protestants of record, the board . . . may recognize as interested parties other persons appearing at a hearing. Upon being so recognized, interested parties may participate in the proceedings."); *see generally* 23 Cal. Code Regs. §§ 745-771.

Recognizing that such procedures must govern the administration of water, especially in the arid states beyond the hundredth meridian, Congress wisely in section 27 reposed that governance in the respective States, and not within a distant and isolated federal bureaucracy.

II. THE SUBSEQUENT HISTORY OF *FIRST IOWA* VALIDATES THE FEDERAL POWER COMMISSION'S ATTEMPTED DEFERENCE TO STATE LAW IN THAT CASE.

The petitioner and respondents in the present case debate the applicability of *First Iowa Hydro-Electric Cooperative v. Federal Power Comm.*, 328 U.S. 152. The petitioner's opening brief, and in particular its recitation of legislative history and application of *California v. United States*, 438 U.S. 645 (1978) to the language of

section 27, show that regardless of the Court's interpretation of section 9(b) in *First Iowa*, that interpretation cannot read a preemptive federal mandate into section 27.

In the petitioner's view, to which the amici subscribe, *California v. United States* represents an intervening doctrinal development that vitiates the Ninth Circuit's interpretation of *First Iowa*. Amici submit that the subsequent history of *First Iowa* itself challenges the Ninth Circuit's reading.

First Iowa arose when the Federal Power Commission *denied* the cooperative's application for a license because it *agreed* with the State of Iowa that the applicant first had to apply for a state license. *First Iowa Hydro-Electric Cooperative*, 4 F.P.C. 27, 30 (1944). The commission believed that under these circumstances of no state *application*, section 9(b) required the FPC application to be dismissed, because Iowa had no opportunity to express itself on the proposed project. *See* 328 U.S. at 188 (dissenting opinion, quoting brief of the Solicitor General).

This Court vacated the FPC's denial, holding that section 9(b) did not require the *issuance* of a state permit. 328 U.S. at 164. The FPC, on remand, granted a 50-year license, notwithstanding the State of Iowa's objection to the project's feasibility. *First Iowa Hydro-Electric Cooperative*, 6 F.P.C. 227 (1947). The licensee was required to commence construction within two years, complete it within four years, and within ninth months submit evidence of financial feasibility. *Id.*

Although the First Iowa Cooperative succeeded in convincing the FPC, over the State's objections, that the

project was feasible, *First Iowa Hydro-Electric Cooperative*, 7 F.P.C. 892 (1948), in fact it has never completed the dam. In 1959 the FPC referred to matter to the Attorney General to initiate license revocation proceedings, finding that "with the exception of a small amount of land clearing and leveling which took place two days before the final date specified for commencement of construction, no work has been done on the project." *First Iowa Hydro-Electric Cooperative*, 21 F.P.C. 244 (1959). But still First Iowa hung on to its paper entitlement, and 14 years later the commission once again had to cite First Iowa's delinquencies and again seek a revocation of the license, observing: "In short, the history of this project is most disappointing. At about the halfway point of the 50-year license, it is doubtful whether this project will ever become a reality." *First Iowa Hydro-Electric Cooperative*, 50 F.P.C. 1864 (1973). The last appearance of this matter in the commission's reports shows that that 1973 reference to the Attorney General had not been accomplished, and once again ordered the revocation to be initiated. *First Iowa Hydro-Electric Cooperative*, 55 F.P.C. 534 (1976).

From this reading of the bare legal record, the amici can only imagine the hundreds or thousands of hours that commission staff, the State's attorneys, and the protesting citizens have been forced to invest in an enterprise whose sole achievement over four decades was to preempt the Cedar River from alternative development or preservation. When all was said and done, the State of Iowa perceived more accurately than the FPC the capabilities and limitations of the State's water resources.

We urge this Court to ask, as the amici themselves have questioned, if the administration of the nation's

water resources under the Federal Power Act will not benefit by greater deference to State Law and State proceedings than that engendered by FERC's and the Ninth Circuit's interpretations of *First Iowa*. The *First Iowa* history validates the amici's assertion that as a practical matter state water law and state water proceedings deserve more deference than *First Iowa* accorded. Not only should section 27 be read to authorize the maintenance of State conditions on the exercise of water rights. Section 9(b), if the occasion arises in this or a future case, should at least require the applicant to *file* for a state water permit, and likely pursue it far enough to determine the conditions under which it would be issued, before initiating federal proceedings that may require decades of FERC involvement and produce only the maintenance of a speculative priority on the affected river or stream.

CONCLUSION

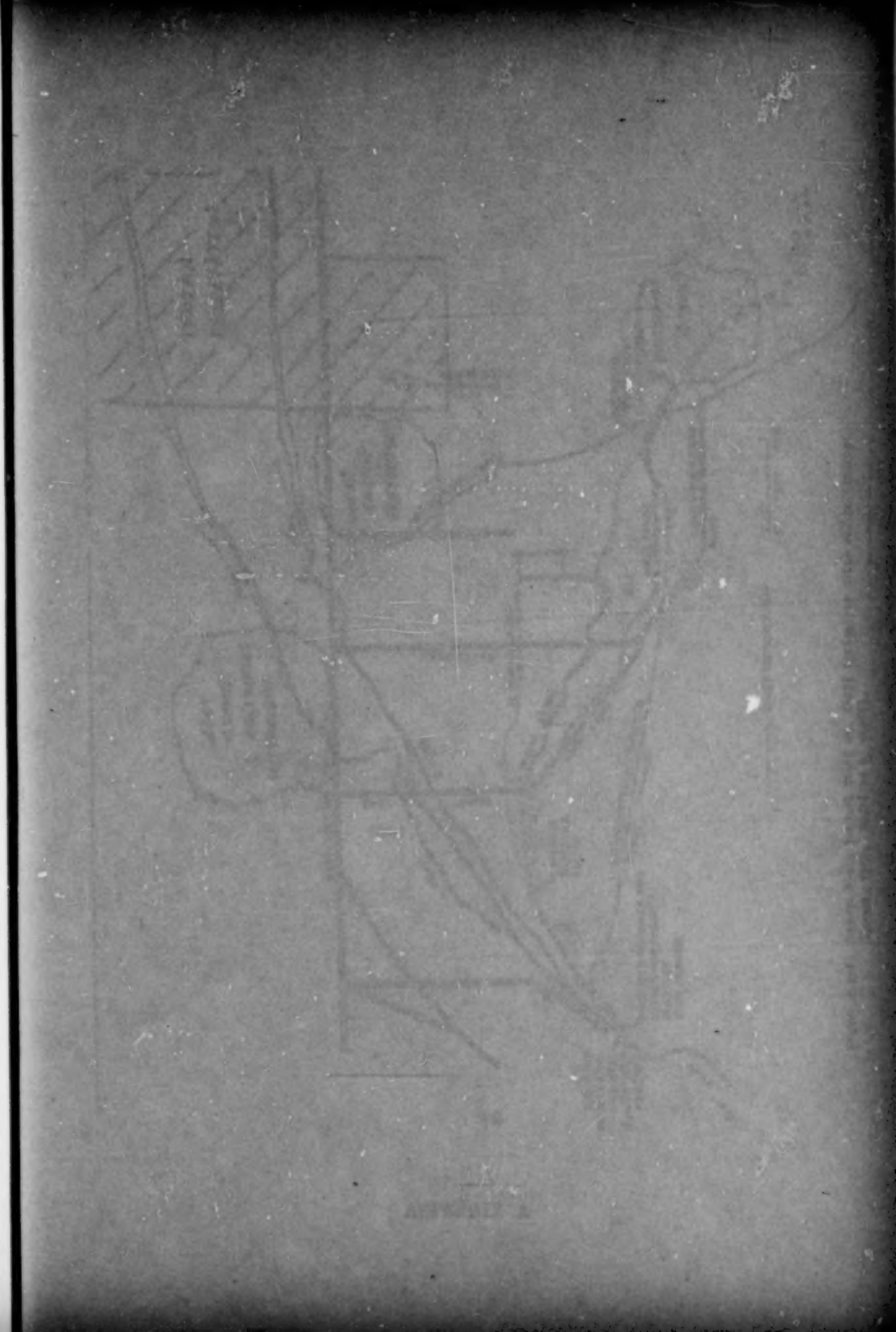
The practical factors addressed by the amici support the doctrinal position of California and her 43 sister states that section 27 wisely preserves to the States the authority to define the exercise of water rights within the States.

Dated: January 10, 1990

Respectfully submitted,

ANTONIO COSBY-ROSSMANN

Special Counsel to the
County of Inyo
Counsel for Amici Curiae



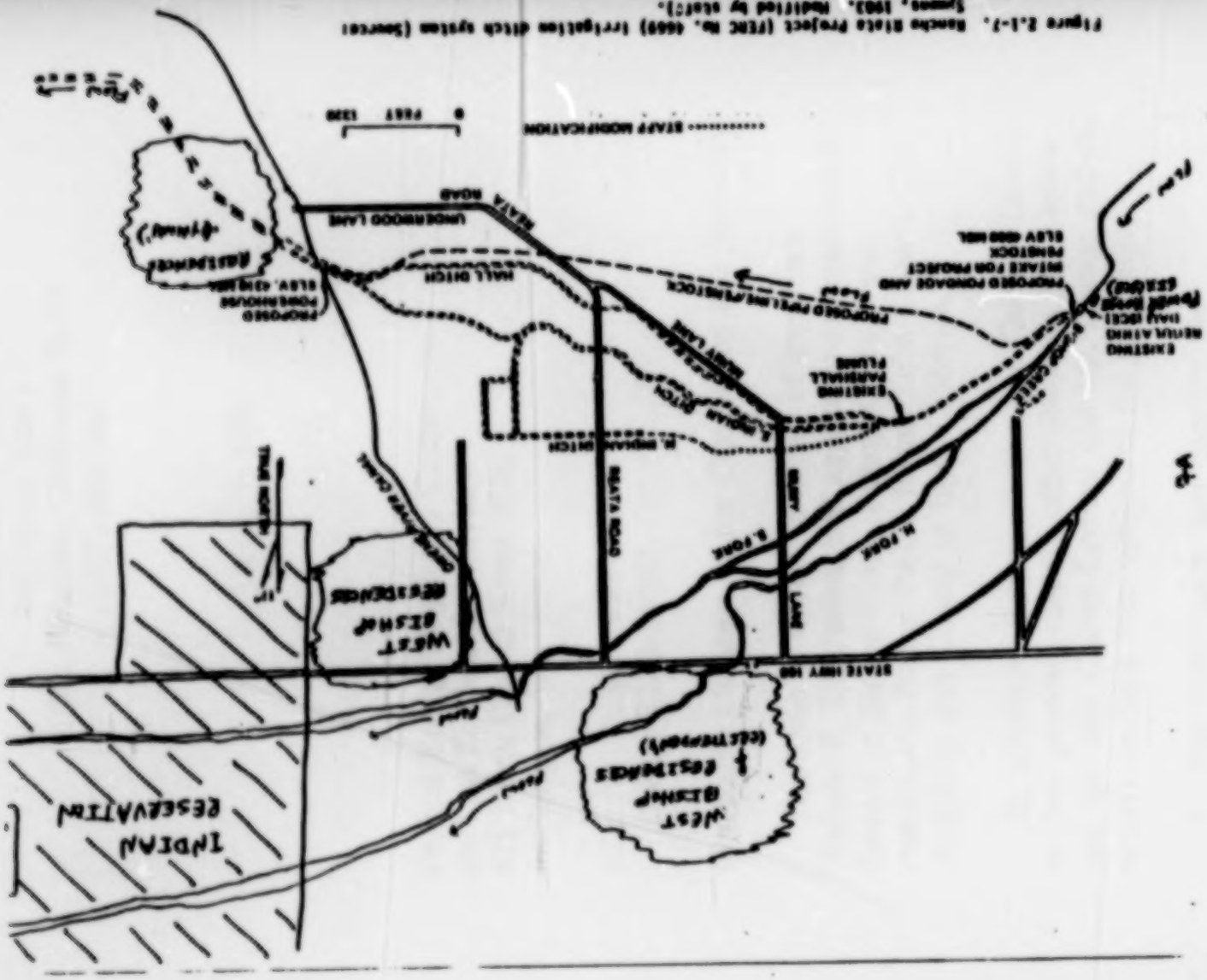


Figure 2.1-7. Rancho Bluto Project (FERC No. 4669) irrigation ditch system (Source: Symons, 1983. Modified by staff).

ANTONIO COSBY-ROSSMANN
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March 7, 1989

Federal Energy Regulatory Commission
c/o Lois D. Cashell, Secretary
825 North Capitol Street, N.E.
Washington, DC 20426

RE: Project 4669-002
Docket EL85-19-102

Honorable Members of the Commission and Secretary:

This letter is written in behalf of intervenor Wallace R. Crittenden, and applicants-for-intervention Friends of Bishop Creek, Bishop Creek Water Association, Bishop Paiute Indian Tribe Council, City of Bishop, and County of Inyo, California.

By telephonic communication with Quentin Lawson of your general counsel's office (between Mr. Lawson and the Inyo County Counsel and Mr. Lawson and this writer) we have been advised of the following:

1. The Commission may consider the

APPENDIX B

above-referenced matter soon (15 or 29 March unlikely, but 12 or 26 April more likely);

2. The staff recommendation to the Commission would not normally be available until the morning of the hearing;

3. The agenda of the Commission, setting the hearing date, would not be available on more than one week's notice.

Under these circumstances, we find it difficult, and very likely impossible, to address the Commission in either support of or challenge to the staff recommendation. We assert that due process requires meaningful advance notice of the date of hearing, meaningful advance receipt of the staff's recommendation, and of course meaningful opportunity to address the Commission on the staff's recommendation.

We request that the Commission, Secretary and staff grant us the meaningful due process outlined above. "Meaningful," in light of the distance involved, the importance of this matter to the Owens Valley community, and the nature of the issues, in our view requires that we receive the agenda and staff report at least two weeks prior to the hearing; and be afforded opportunity to address the Commission both in writing and by oral argument in advance of the submission of the matter for decision.

Kindly provide us with the notice and opportunity described here. Without waiving our claim that we are constitutionally and statutorily entitled to the notice

and opportunity here requested, we request as a minimum that we receive telephonic or facsimile notice of the meeting at which this matter will be considered by the Commission. This writer's facsimile number is (415) 861-1822; Inyo County's is (619) 873-5695.

Thank you for your attention to this request.

Yours sincerely,

/s/

Antonio Cosby-Rossmann
Counsel for Wallace R. Crittenden, et al.

ACR/cas
cc: Fred Springer, Director, Hydropower Licensing
Quentin Lawson, Esq., General Counsel's Office
Rancho Riata Hydro Partners
John L. Symons
County of Inyo
City of Bishop
Bishop Paiute Indian Tribe Council
Friends of Bishop Creek
Wallace R. Crittenden

FEDERAL ENERGY REGULATORY COMMISSION

Washington, D.C. 20426

April 10, 1989

Antonio Cosby-Rossmann, Esq.
380 Hayes Street
San Francisco, CA 94102

Dear Mr. Cosby-Rossmann:

This responds to your March 7, 1989 letter to the Federal Energy Regulatory Commission (Commission). In your letter you asked that the Commission provide you, as counsel for an intervenor and certain applicants-for-intervention, a copy of the Commission Meeting Agenda and any advisory staff recommendations that the Commission will discuss at its meeting at least two weeks in advance of the meeting. You claim that you are entitled, as a matter of "due process" to meaningful advance notice of the date of the Commission "hearing," advance receipt of the advisory staff's recommendation and an opportunity to address the Commission on the advisory staff's recommendations.

You misunderstand the nature of the Commission's meetings. These mettings [sic] are not "hearings" in which the Commission invites the public to participate. Moreover, they are not "hearings" in the sense of contested proceedings before an Administrative Law Judge. The purpose of Commission meetings is for the Commissioners to deliberate and discuss the

Commission's business and consider the advice of the Commission staff on each item of business. To the extent that the Commission meetings fall within the definition of "meetings" as contemplated by the Government in the Sunshine Act (5 U.S.C. § 552(b)), the Commission opens its meetings to the public. However, under the Administrative Procedure Act (5 U.S.C. § 551, et seq.), the public and parties to proceedings before the Commission for a decision have no "right" to participate in the Commission's deliberations. Indeed, the Freedom of Information Act (FOIA) protects the deliberative process among the Commissioners and between the Commission and its advisory staff. 5 U.S.C. § 552(b)(5).

The Commission staff referred to in your letter is advisory staff whose function is to assist the Commission in its decisional process. The public is not entitled to comment on or debate the advisory staff's recommendations to the Commission. Indeed, the deliberative process privilege recognized by the FOIA protects staff advice from public scrutiny and comment.

At this point, the Commission has not scheduled any public hearings on Project No. 4669-002, Docket No. EL85-19-102. In the event the Commission schedules public hearings on any matters related to that docket, the Commission will provide adequate advance public notice that will permit you to participate on behalf of your clients.

I hope that this information will be helpful.

Sincerely,

/s/

Catherine C. Cook
General Counsel